Supreme Court, U.S.
FILED
DEC 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-734

In the Supreme Court of the United States

OCTOBER TERM, 1985

HORACE E. BRESSLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

United States v. *Aitken*, 755 F.2d 188 ..... 3, 4, 5, 6

United States v. *Moore*, 627 F.2d 830, cert. denied, 450 U.S. 916 ..... 3, 5

United States v. *Phillips*, 775 F.2d 262 6

United States v. *Ware*, 608 F.2d 400 6

United States v. *Young*, No. 83-469 (Feb. 20, 1985) 5, 6

Constitution, statutes and rule:

U.S. Const. Amend. VI 3

26 U.S.C. 7201 2

26 U.S.C. 7203 2

Fed. R. Crim. P. 52(b) 4

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Petitioner contends that the district court committed plain error in instructing the jury that "[a] good faith misunderstanding of the law may negate willfulness if the misunderstanding is reasonable (Pet. App. K63-K64)."[1]

1. Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on two counts (Counts One and Three) of willfully failing to file tax returns for 1977 and 1978, in violation

[1]The petition appears to be untimely under Rule 20 of the Rules of this Court. The court of appeals issued its opinion and entered judgment on August 27, 1985, and the petition for a writ of certiorari was filed on October 28, 1985, 62 days after the court entered judgment, without a notarized statement from a member of the bar of this Court stating that it was mailed in timely fashion as required by Rule 28.2. The court issued a supplemental statement on September 6, 1985, but it does not appear that the supplemental statement affected the date of judgment.

of 26 U.S.C. 7203, and on one count (Count Two) of willfully evading substantial tax liability for 1978, in violation of 26 U.S.C. 7201. He was sentenced to five years' imprisonment and fined $10,000 on Count Two; to a concurrent sentence of one year's imprisonment on Count Three; and to a consecutive sentence of five years' probation on Count One. The court of appeals affirmed (Pet. App. K54-K78).

Petitioner, a tax protester, had substantial income from a variety of sources during 1977 and 1978. The evidence at trial established that petitioner received total gross income in 1977 of $102,871 and in 1978 of $150,578, and a government expert computed petitioner's taxable income in 1978 at $42,071, yet he did not file income tax returns for those years. Pet. App. K56-K57.

Petitioner conducted public meetings where he advised his audience that paying income taxes was voluntary and that he had not filed a tax return in 13 years. He stated that a person's chances of getting caught for failure to file tax returns is slim and that the American people are "dumb, dumb, dumb" for filing tax returns. He advocated several methods for avoiding income tax, including making oneself judgment-proof by transferring real property into trust and by removing assets from banks. In January 1981, petitioner transferred 10 of his own properties, including his house, to his son; each property was transferred for less than $100. Pet. App. K57-K59.

Testifying in his own defense, petitioner attempted to convince the jury that he believed that paying income taxes is voluntary. He said that in 1971 he read the Internal Revenue Service's Form 1040 instruction booklet and noticed that it stated that "[e]very year Americans voluntarily file tax returns" (Pet. App. B33-B34). Turning to his dictionary, petitioner discovered that "voluntary" means

"without legal obligation," so he concluded that he was not required to file tax returns (*ibid.*). Petitioner apparently chose to ignore that portion of the instruction booklet, which he acknowledged reading, informing taxpayers that they "must file a return or statement with us for any tax you are liable for" (Pet. App. B35-B36).

The district court instructed the jury that the government had to prove that petitioner had acted willfully. The court explained that "willfully" means the "voluntary and intentional violation of a known legal obligation" (Tr. 1355). It added that a "good faith misunderstanding of the law may negate willfulness if the misunderstanding is reasonable" (*ibid.*). Petitioner did not object to these instructions.[2]

2. The court of appeals rejected petitioner's argument that the district court committed plain error by instructing the jury that a good faith misunderstanding that is *reasonable* negates willfulness. Petitioner relied primarily on *United States* v. *Aitken*, 755 F.2d 188, 192 (1st Cir. 1985), where the court held that "the overwhelming weight of authority in the field of criminal prosecutions for failure to file tax returns and for tax evasion insists on a subjective standard for assessing wilfulness." The court here first noted (Pet. App. K64-K65) that Seventh Circuit precedent, particularly *United States* v. *Moore*, 627 F.2d 830 (1980), cert. denied, 450 U.S. 916 (1981), although not entirely clear, suggested that an objective standard is appropriate. But the court expressly declined to decide whether an objective or a subjective standard is appropriate (Pet. App. K65

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[2]Petitioner represented himself at trial, refusing the assistance of court-appointed counsel. The court of appeals rejected his argument that the district court violated his Sixth Amendment right to counsel by refusing to let two nonlawyers represent him. Pet. App. K77-K78 n. 5.

n.1), holding instead that it did not have to decide that issue since "plain error has not been shown here" (*id.* at K66).[3]

The standard for judging plain error under Fed. R. Crim. P. 52(b), the court stated, is "whether the alleged error in the district court's charge had a probable impact on the jury's finding that the defendant was guilty" (Pet. App. K67; quotations omitted). There was no such impact in this case, the court held, because "the evidence clearly established that the defendant did not 'misunderstand' the law at all" (*id.* at K68). The fact that petitioner, "a sophisticated businessman with substantial real estate holdings," had advised people that their chances of getting caught for failing to file were slim and that they could avoid liability by making themselves judgment-proof, as he had done, showed "that he had no good faith, bona fide misunderstanding of the law, either subjective or objective" (*id.* at K68-K69). Rather, the court concluded, the evidence showed that petitioner disagrees with the law (*id.* at K69).

3. The decision below is correct and, contrary to petitioner's argument, does not conflict with the First Circuit's decision in *Aitken*. Accordingly, review by this Court is not warranted.

While there may be a conflict in the circuits on the question whether an objective or a subjective standard applies in criminal prosecutions of tax protesters, this case does not present that issue. The court of appeals here expressly declined to decide whether an objective or a subjective

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[3]The court also noted (Pet. App. K70 n.2) that the instruction at issue did not speak of "objective" reasonableness or "subjective" reasonableness, but merely stated that a good faith misunderstanding that is "reasonable" negates willfulness. The court added that while lawyers ordinarily understand reasonable to mean "objectively reasonable," it is not clear that jurors do (*ibid.*).

standard should be applied (Pet. App. K65 n.1). Accordingly, while review may be appropriate if the Seventh Circuit continues to follow the statement in *Moore* that an objective standard is proper, this case presents no occasion to resolve any conflict.[4]

The issue presented here is whether the court of appeals erred in determining that the jury instructions were not plain error. And, as the court of appeals concluded, any error was not plain. In *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 14, this Court recently reiterated the rule that "only 'particularly egregious errors,' *United States* v. *Frady*, 456 U.S. 152, 163 (1982), those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings,' *United States* v. *Atkinson*, 297 U.S., at 160," are plain errors. Quoting *Frady*, the Court stated that "the plain error exception to the contemporaneous objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " *Young*, slip op. 14.

What occurred here does not come close to satisfying that standard. First, as the court of appeals noted (Pet. App. K70 n.2), it is not even clear that the jury understood that an objective standard was to be applied, since the instruction stated that a misunderstanding must be "reasonable" rather than "objectively reasonable." More importantly, as the court stressed, it is clear that petitioner would have been

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[4]It is not clear that the Seventh Circuit will in the future adopt an objective standard. The court here noted that the Seventh Circuit's decisions have not been entirely consistent (Pet. App. K65 & n.1), as did the First Circuit in *Aitken* (755 F.2d at 192 & n.2). Petitioner suggests that "even the Seventh Circuit has a conflict" (Pet. 17), a claim that would support a suggestion for rehearing en banc — which petitioner did not seek in this case — in a case in that circuit properly presenting the issue. But disagreement within the Seventh Circuit does not warrant review by this Court.

convicted under either an objective or a subjective standard since the evidence plainly showed that he did not misunderstand the tax laws but instead disagreed with them. All courts recognize that disagreement with the law is not a defense. See, *e.g.*, *United States* v. *Phillips*, 775 F.2d 262, 264 (10th Cir. 1985); *Aitken*, 755 F.2d at 192 (quoting *United States* v. *Ware*, 608 F.2d 400, 405 (10th Cir. 1979)). Accordingly, there was no "egregious error" or "miscarriage of justice" here.

Petitioner suggests (Pet. 25-27) that the decision below is inconsistent with *Aitken* because the First Circuit found plain error in that case when the district court instructed the jury to apply an objective standard. However, there is no conflict. The First Circuit did not hold that such instructions were *per se* plain error. Rather, it held that the defendant in that case might have been prejudiced by the instruction (755 F.2d at 194). Moreover, this Court recently made clear that "a *per se* approach to plain error review is flawed" (*Young*, slip op. 15 n.14). Instead, "each case necessarily turns on its own facts" (*id.* at 15; quotations omitted). Thus there is no conflict between the First Circuit's decision that under the facts of *Aitken* the defendant was prejudiced and the court of appeals' conclusion that petitioner was not prejudiced.[5]

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[5]There was no evidence in *Aitken* comparable to petitioner's statement that the chances of getting caught for not filing a tax return are slim, which clearly shows that petitioner understood that he was required to file a return. Moreover, the defendant in *Aitken* was a fireman (755 F.2d at 189), rather than a "sophisticated businessman" like petitioner. In addition, the instruction at issue in *Aitken* clearly stated that a good faith misunderstanding of the law must be "objectively reasonable" (*id.* at 190), unlike the instruction here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

DECEMBER 1985